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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

MEDIA ACCESS PROJECT

Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M St., NW
Washington, DC 20554

Re: *Ex parte* presentation in MM Docket 93-25

Dear Ms. Salas:

On September 8, 1998, Cheryl A. Leanza, Gigi B. Sohn, and Sabrina Youdim of Media Access Project met with Deputy Bureau Chief Rosalee Chiara and James Taylor of the International Bureau on behalf of DAETC *et al.* to discuss the Commission's implementation of Section 25 of the 1992 Cable Act.

Ms. Sohn and Ms. Leanza provided copies of a memo, a copy of which is attached, discussing the meaning of "editorial control" as it appears in Section 25(b) of the Act. In addition, Ms. Sohn and Ms. Leanza stated that the Commission had previously interpreted this phrase in its proceeding implementing the leased access provisions of the 1992 Cable Act. Ms. Sohn and Ms. Leanza provided copies of the relevant portion of that decision, a copy of which is attached. *1992 Cable Act Implementation, Second Report and Order*, 12 FCC Rcd 5267 at 5316-18 (1997). In this decision, the Commission determined that, so long as there is sufficient capacity, a cable provider must accommodate all programmers seeking space on commercial leased access channels. If sufficient capacity is not available, the Commission concluded that the cable operator was limited to using "objective, content neutral" criteria to select among programmers. Ms. Sohn and Ms. Leanza discussed the possibility of allowing DBS providers several options, in addition to the leased access model, to comply with the prohibition on the exercise of editorial control, including allowing them to create an industry-wide consortium or individual arms-length non-profit corporations that will select programming and programmers. Finally, Ms. Sohn and Ms. Leanza indicated that proper implementation of the 4 to 7 percent channel capacity set-aside for noncommercial informational and educational programming will provide a prime opportunity for the Commission to achieve its goal of providing programming for underserved communities.

Pursuant to section 1.1206(b)(2) of the Commission's rules, an original and three copies of this letter are being filed with your office today.

Sincerely,

Cheryl A. Leanza
Staff Attorney

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Attachments
cc: Rosalee Chiara
James Taylor

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MEMORANDUM

August 13, 1998

From: Cheryl A. Leanza
Gigi B. Sohn

Re: The Definition of "Editorial Control" in Section 25(b) of the 1992 Cable Act; MM Docket 93-25.

The plain language of Section 25(b) of the 1992 Cable Act prohibits DBS providers from selecting, removing, or scheduling programming broadcast on the channel capacity set-aside for noncommercial educational or informational programming.

I. Introduction

Section 25(b)(3) of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") states: "The provider of direct broadcast satellite service ***shall not exercise any editorial control*** over any video programming provided pursuant to this subsection." 47 USC § 335(b)(3) (emphasis added). DBS providers incorrectly argue that Section 25(b)(3) allows them to select and "package" programming transmitted to fulfill DBS providers' obligation to reserve between 4 and 7 percent of their channel capacity for "noncommercial programming of an educational or informational nature." 47 USC § 335(b)(3); *see, e.g.*, DirectTV supplemental comments at 9 (filed April 28, 1997). As Media Access Project has previously argued on behalf of the Denver Area Educational Telecommunications Consortium ("DAETC") and 17 other organizations, this interpretation is inconsistent with the plain language of Section 25(b)(3). *See* Comments of DAETC, *et al.* at 17-18 (filed April 28, 1997). Editorial control includes selection and placement of programming. Therefore, the statutory language prohibiting DBS providers from exercising editorial control prohibits them from, *inter alia*, selecting, rejecting, and removing programming, and determining at what hours programming will be broadcast.

II. The Supreme Court and Other Courts Have Found that Editorial Control Includes Selection and Placement of Programs and is Not Limited to Altering the Content of Programs.

The Supreme Court has characterized editorial control as including the right "to pick and to choose programming." *See Denver Area Ed. Tel. Consortium v. FCC*, 518 U.S. 727 at 738 (1996) ("*DAETC v. FCC*"). In *DAETC v. FCC*, the Court addressed the constitutionality of Section 10 of the 1992 Cable Act, which, *inter alia*, granted a cable provider the right to limit or prohibit the carriage of indecent programming on its leased and public, educational, and governmental ("PEG") access channels. Pub. L. No. 102-385, 106 Stat. 1460, 1486. The Court concluded that Section 10

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restored a cable provider's right to exercise editorial control over such programming. *DAETC v. FCC*, 518 U.S. at 734-35, 737-38 (describing change from prior law which prohibited cable providers from exercising any editorial control over public access channels). The Court then concluded that, by exercising its newly-restored editorial control, the cable provider would be allowed to "rearrange or reschedule patently offensive programming," or ban such programming altogether. *DAETC v. FCC*, 518 U.S. at 746. Earlier, in *Turner Broadcasting v. FCC*, the Court upheld the constitutionality of the "must-carry" provisions of the 1992 Cable Act in the face of a challenge brought by cable television operators. *Turner Broadcasting v. FCC*, 512 U.S. 622, 114 S.Ct. 2445, *aff'd*, 117 S.Ct. 1174 (1997). Acknowledging that "the provisions interfere with cable operators' editorial discretion by compelling them to offer carriage to a certain minimum number of broadcast stations," the Court nonetheless upheld these provisions as content-neutral restrictions that serve an important government interest. *Turner Broadcasting v. FCC*, 114 S.Ct. at 2460 (1994). In *DAETC* and *Turner*, the Supreme Court held that a wide array of decisions, including both the decision to carry an entire broadcast channel and decisions with respect to scheduling and placement of programming, constitute the exercise of editorial control. *See also Arkansas Educ. Tel. Comm'n v. Forbes*, 118 S.Ct. 1633, 1639 (1998) ("Public and private broadcasters alike are not only permitted, but indeed required, ***to exercise substantial editorial discretion in the selection and presentation of their programming***.") (emphasis added); *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986) (characterizing the exercise of "***editorial discretion over which stations or programs to include*** in [a cable provider's] repertoire" as speech worthy of some First Amendment protection) (emphasis added). The broad definitions of editorial control or editorial discretion[1] espoused by the Supreme Court do not comport with the DBS providers' contention that editorial control is limited to controlling the content of a specific program.[2]

The U.S. Court of Appeals for the Second Circuit has twice adopted a broad definition of editorial control, thereby protecting those who seek to place programming on public access channels. *Time Warner Cable v. Bloomberg*, 118 F.3d 917 (2d Cir. 1997); *McClellan v. Cablevision*, No. 97-7156, (2d Cir. Jul. 17, 1998). The concerns expressed by the Second Circuit in these cases demonstrate the danger associated with adopting an exceedingly narrow definition of editorial control in the DBS arena. As the Second Circuit recognizes, the exercise of such control includes

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[1] "Editorial control" and "editorial discretion" are often both used to describe the editorial function. *See, e.g., DAETC v. FCC*, 518 U.S. at 737.

[2] The definition of editorial control as it is applied to newspapers is also instructive. For example, *Miami Herald Publishing Co. v. Tornillo*, the Supreme Court held that editorial judgement includes a decision to include a story in a newspaper, decisions about the story's placement, and decisions regarding how much space to allocate to the story. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 at 256 (1974) *quoting Pittsburgh Press Co. v. Human Relations Commission*, 413 U.S. 376, 391 (1973) (holding that "[e]ditorial judgement" includes decisions with respect to "content or layout on stories or commentary."); *id.* at 258 ("[t]he choice of material to go into a newspaper, and the decisions made as to limitations on the size of the paper, and content . . . constitutes the exercise of editorial control and judgement").

the power to silence a speaker in addition to the power to affirmatively disseminate certain ideas and programming.

In both cases the Second Circuit considered the meaning of Section 611(e) of the Communications Act, 47 USC § 531(e), whose pertinent language is identical to Section 25(b) and which prohibits a cable operator from "exercis[ing] any editorial control" over PEG channels. 47 USC § 531(e). In *Time Warner Cable v. Bloomberg*, the Second Circuit cautioned future courts that they should prevent cable providers from refusing to transmit certain programming--the same power that DBS providers now seek. *Time Warner Cable v. Bloomberg*, 118 F.3d 917 (2d Cir. 1997). Specifically, the court cautioned that cable companies should not be allowed to "bar disfavored programming" under the guise of determining what programming should be considered to fall within the "public, educational, and governmental" classification. *Id.* at 928-29. In a recent case, the Second Circuit again expressed concern that cable providers might refuse to broadcast certain programming by exercising editorial control withheld from them by statute. In *McClellan v. Cablevision*, the court concluded that Section 611 contains an implied private cause of action for individuals who seek to place programming on cable systems' public access channels. *McClellan v. Cablevision*, No. 97-7156, (2d Cir. Jul. 17, 1998). The Second Circuit granted such a cause of action because, in part, it concluded that "Congress specifically intended to withhold from cable operators the authority to exercise editorial control . . . ." *Id.* slip. op. at 14. The Court further stated that "[Section 611(e)] provides no support for Cablevision's refusal to broadcast *all* of McClellan's future programming--the strongest and broadest possible form of editorial control--because such action clearly falls outside of the statute's exemption." *Id.* at n.14. Section 25(b)(3) similarly deprives DBS providers of this power.

At least one district court's decision demonstrates that editorial control includes selection of programming based on an evaluation of the program as a whole, and not to merely include deletion of certain portions of a program. In *Altman v. Television Signal Corp.*, the District Court for the Northern District of California also considered a challenge to Section 10 of the 1992 Cable Act. *Altman v. Television Signal Corp.*, 849 F.Supp. 1335 (N.D. Ca. 1994). Plaintiffs challenging the constitutionality of the statute sought a temporary restraining order preventing a cable television provider from refusing, as it had in the past, to carry certain programs in their entirety on public access and leased access cable channels.[3] The plaintiffs succeeded in obtaining a temporary restraining order prohibiting the cable television provider from, *inter alia*, "attempting to segregate or otherwise utilize its ***editorial discretion*** to regulate indecent material on public access cable" and from "using its ***editorial discretion*** to regulate indecent material on leased access cable . . . ." *Id.* at 1347 (emphases added and emphases in the original omitted). In phrasing the restraining order as it did, and in using that order to prohibit the cable provider from engaging in its previous conduct, the district court demonstrated that it considered the term "editorial discretion" to mean refusing to carry a certain program in its entirety, not simply altering the content of a particular program. This

[3] Although the cable provider was accused of interrupting programs, it was also accused of refusing to carry an entire series of programs because the provider considered some episodes to be indecent.

case provides another example of a cable operator that sought to use editorial control to prevent the public from hearing a particular speaker.[4]

III. Commission Precedent Also Demonstrates that Editorial Control includes the Selection and Packaging of Programming.

Several Commission decisions implementing the 1992 Cable Act demonstrate that the Commission believes that exercising editorial control over programming includes selection of such programming. For example, when implementing Section 10 of the 1992 Cable Act, the Commission repeatedly referred to the authority to limit or block indecent programming granted to cable providers by Section 10 as the authority to exercise editorial control or discretion over such programming. *See, e.g., Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Indecent Programming and Other Types of Materials on Cable Access Channels*, 8 FCC Rcd 2638, 2639 (1993) (characterizing the power granted to cable operators in Section 10 as the exercise of "editorial discretion").

In addition, Section 22 of the 1992 Cable Act expanded application of EEO rules to "any multichannel video programming distributor." Pub. L. No. 102-385, 106 Stat. 1460, 1498-99. The Commission concluded that Congress, in expanding EEO rules to certain providers, sought to apply these rules to providers that exercised control over video programming provided directly to the public. *Implementation of Section 22 of the Cable Television Consumer Protection and Competition Act of 1992, Equal Employment Opportunities*, 8 FCC Rcd 5389, 5398 (1993). The Commission concluded that an entity would be deemed to have control over video programming "if it selects video programming channels or programs and determines how they are presented for sale to consumers." *Id.*

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[4] Moreover, as DAETC *et al.* has previously argued, the single district court case cited by DBS providers does not support their contention that "choosing which programs to carry[] generally does not rise to the level of editorial control." *See* DirectTV supplemental comments at 9 (filed April 28, 1997) *citing Cubby v. CompuServe*, 776 F.Supp. 135, 140 (S.D.N.Y. 1991); DAETC *et al* reply comments at n.4 (filed May 28, 1997). In *Cubby*, the court found that Compuserve was not liable for defamation under New York law because it did not exert editorial control over the contents of the certain publications contained in its online "Journalism Forum." But this holding does not in any way hold or imply that a party does not ***also*** exercise editorial control when it selects particular publications or programming. Under New York law, liability for defamatory statements only attaches if a party knew or had reason to know of those statements. Thus, the only question before the court was whether Compuserve had reason to know about the defamatory statements because it edited the contents of the publications. While DAETC, *et al.* do not dispute that editorial control includes the power to edit the contents of a program, it asserts that it also includes the power to select, reject, add and remove such programming.

IV. Congress Intended "Editorial Control" to Include Selection and Placement of Programming.

The pertinent language in Section 25(b)(3) is identical to the language in Section 612(c)(2) of the Communications Act. *Compare* 47 USC § 335(b)(3) *with* 47 USC § 532(c)(2). Section 612(c)(2) states that cable operators "shall not exercise any editorial control" over commercial leased access channels. 47 USC § 532(c)(2). According to the legislative history, Congress intended Section 612(c)(2) to forbid cable operators from selecting and packaging programming. By using the same language in Section 25(b)(3) of the 1992 Cable Act that it used in Section 612(c)(2) of the Communications Act, Congress was adopting the same proscription in both Sections. Specifically, when it adopted the language in Section 612, the House Commerce Committee stated:

> The overall purpose of this section is to ***prohibit any editorial control*** by the cable operator ***over the selection of programming*** provided over channels designated for commercial leased access. ***This prohibition . . . restricts the cable operator from considering the content of a proposed service, thus assuring that even indirect editorial influences do not permeate what the Committee intends to be content-blind, arm's length negotiations over access to the set aside channels.***

H. Rep. 98-934, 98th Cong., 1st Sess. at 51-52 (1984) (emphases added). The Commission cannot rationally interpret the identical phrases in Section 612(c)(2) and Section 25(b)(3) to govern different conduct.

V. Conclusion

As demonstrated herein, editorial control includes much more than DBS providers acknowledge. The Commission does not have discretion to adopt the DBS industry's arguments: they are incompatible with the plain language of the Communications Act. *See Chevron v. N.R.D.C.*, 467 U.S. 837 (1984).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
	)	
Implementation of Sections of the	)	
Cable Television Consumer Protection	)	CS Docket No. 96-60
and Competition Act of 1992:	)	
	)	
	)	
Leased Commercial Access	)	

SECOND REPORT AND ORDER AND SECOND ORDER ON RECONSIDERATION OF THE FIRST REPORT AND ORDER

Adopted: January 31, 1997 **Released: February 4, 1997**

By the Commission:

Table of Contents

H. Selection of Leased Access Programmers

1. Background

98. In the *Further Notice*, the Commission proposed rules to govern a cable operator's selection of leased access programmers.[254] We tentatively concluded that an operator should be required to select leased access programmers on a first-come, first-served basis as long as the operator's available leased access capacity is sufficient to accommodate all incoming requests.[255] We sought comment on whether an operator should be allowed to accept leased access programmers on any other basis if its system's available leased access capacity is insufficient to accommodate all pending requests.[256] Specifically, we noted that where demand for leased access channels exceeds the available supply, it may be appropriate to allow an operator to make content-neutral selections in order to avoid situations that could "adversely affect the operation, financial condition, or market development of the cable system."[257] We asked whether it would be appropriate, when two or more leased access programmers simultaneously demand the last available leased access space, to allow the cable operator to select a leased access programmer based on the amount of time requested (e.g., a full-time request versus a part-time request).[258] We also sought comment on whether operators should be permitted to base their selections on any content-neutral criteria other than the amount of time requested by the programmers.[259]

2. Discussion

99. We conclude that, so long as an operator's available leased access capacity is sufficient to satisfy the current demand for leased access, all leased access requests must be accommodated as expeditiously as possible, unless the operator refuses to transmit the programming because it contains obscenity or indecency.[260] We believe that such an approach is the most appropriate method of assuring that cable operators comply with Section 612(c)(2),

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[254] *Further Notice* at paras. 127-29.

[255] *Id.* at para. 128.

[256] *Id.*

[257] *Id.* (quoting Communications Act § 612(c)(1), 47 U.S.C. § 532(c)(1)).

[258] *Id.* at para. 129.

[259] *Id.*

[260] *See* Communications Act § 612(c)(2), 47 U.S.C. § 532(c)(2).

which explicitly restricts operators' exercise of editorial control over leased access programming.[261] Section 612(c)(2) provides that "a cable operator shall not exercise any editorial control over any video programming provided pursuant to this section, or in any other way consider the content of such programming," except in the case of programming containing obscenity or indecency, or to the minimum extent necessary to set a reasonable price.[262] We believe that requiring operators to accommodate all leased access requests when the programming does not contain obscenity or indecency, so long as there is available capacity, will most effectively restrict operators' exercise of editorial control, without impinging upon their discretion with regard to price and sexually-oriented programming. We also believe that such an approach will further the statutory objective to promote competition because it will reduce an operator's ability to select leased access programming based on anti-competitive motives.

100. We believe, however, that an operator should be allowed to make objective, content-neutral selections from among leased access programmers when the operator's available leased access channel capacity is insufficient to accommodate all pending leased access requests.[263] In the full-time channel context, this situation would arise if two or more leased access programmers requested the remaining available leased access space; in the part-time context, this situation could arise, for example, if two or more programmers requested the 8:00 p.m. to 9:00 p.m. time slot on the system's part-time leased access channel. In such situations, we believe that the cable operator should be allowed to make an objective, content-neutral selection among the competing programmers. For example, the operator could hold a lottery.[264] Or, the operator could base its decision on other objective, content-neutral criteria such as a programmer's non-profit status,[265] the amount of time a programmer is willing to lease,[266] or a programmer's willingness to pay the highest reasonable price for the capacity at issue.[267]

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[261] *Id.* The record reflects that many commenters are in favor of controlling an operator's selection of leased access programming through some variation of a first-come, first-served approach. *See* Asiavision Comments at 1; CME, et al. Comments at 25; Game Show Network Comments at 23-26; Intermedia/Armstrong Comments at 13-14; Telemiami Comments at 22; ValueVision Comments at 13-14; Viacom Comments at 13. *But see* NCTA Comments at 31-32; Outdoor Life, et al. Comments at 37; TCI Comments at 36-37; Daniels, et al. Reply at 10.

[262] Communications Act § 612(c)(2), 47 U.S.C. § 532(c)(2).

[263] *Further Notice* at para. 128.

[264] *See* Visual Media Comments at 7; CME, et al. Comments at 25.

[265] *See, e.g.*, CME, et al. Comments at 25-26.

[266] Several commenters support a preference for full-time programmers or programmers requesting the greatest total usage of channel capacity. *See* A&E, et al. Comments at 59-60; Lorilei Comments at 15; Outdoor Life, et al. Comments at 37.

[267] *But see* Viacom Comments at 13.

Allowing flexibility within this limited context will better enable operators to assure the growth and development of their cable systems.[268]

I. Procedures for Resolution of Disputes

1. Background

101. In the *Further Notice*, the Commission proposed to streamline its complaint process by establishing a rule that a leased access programmer may not file a complaint alleging that a leased access rate is unreasonable until an independent accountant has reviewed the cable operator's calculations and made a determination of the maximum rate.[269] We proposed to allow the operator to select the independent accountant when the parties cannot agree on a mutually acceptable accountant.[270] Our proposal required the accountant's review to be conducted within 60 days of the leased access programmer's request to the operator for a review.[271]

102. The Commission solicited comment on whether, in the absence of any evidence to the contrary, a determination by the accountant that the cable operator's rate exceeds the permissible rate should satisfy the complainant's burden to rebut, with clear and convincing evidence, the statutory presumption that an operator's rates are reasonable.[272] In addition, we tentatively concluded that the accountant's final report should be filed in the cable system's local public file in order to provide notice to other potential leased access programmers.[273] We asked whether, in the alternative, we should require operators to provide the accountant's final report to other leased access programmers upon request.[274] We sought comment on what type of information should be included in the accountant's final report and what type of information should remain confidential.[275] We also asked whether the responsibility for paying the accountant's expenses should be shared equally by both parties or borne only by the party proven

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[268] *See* Daniels, et al. Comments at 23; NCTA Comments at 31-32; Outdoor Life, et al. Comments at 37; TCI Comments at 36-37; Time Warner Comments at 18; Travel Channel Comments at 23.

[269] *Further Notice* at para. 137.

[270] *Id.*

[271] *Id.*

[272] *Id. See also* Communications Act § 612(f), 47 U.S.C. § 532(f).

[273] *Further Notice* at para. 138.

[274] *Id.*

[275] *Id.*